FILE COPY

MOTION FILED FEB 17 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1959

No. 696

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner,

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

and

WHEC, INC.,
VETERANS BROADCASTING CO., INC.,
Intervenor-Respondents.

MOTIONS BY PETITIONER (1) FOR LEAVE TO USE PRIOR RECORD, AND (2) TO PERFECT THE RECORD

CHARLES F. O'NEAL,
1625 K St., N.W.,
Washington 6, D. C.,
Attorney for Petitioner.

17 February 1960.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1959

No. 696

FEDERAL BROADCASTING SYSTEM, INC.,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent,

and

WHEC, INC.,
VETERANS BROADCASTING CO., INC.,
Intervenor-Repondents

MOTIONS BY PETITIONER (1) FOR LEAVE TO USE PRIOR RECORD, AND (2) TO PERFECT THE RECORD

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Federal Broadcasting System, Inc., the petitioner in this case, respectfully asks this Honorable Court (1) for leave to use a portion of a prior record in this same litigation, and (2) for an order directed to the United States Court of Appeals for the District of Columbia Circuit instructing it to require the respondent Commission to supply those

certain materials that have been withheld from the record in this case, as hereinafter identified, and to transmit same to this Court for consideration by this Court in connection with the instant Petition for Writ of Certiorari.

(1) Motion for Leave to Use Prior Record

The portion of the prior record petitioner asks leave to use in this Court is printed in full in the Annex to this motion. The prior record is that in the court below in Appeal No. 12,252 which was the first of the three occasions on which this identical case was before that court. The materials in that record that Federal asks to use in this Court consist of (a) the "Motion to Perfect the Record" filed by Federal on 20 July 1954, and (b) the Per Curiam Order of the Court below which, *inter alia*, refused to require the Commission to produce for the record such records as it had in its possession and that related to the diverse views within the Commission as to what actually occurred at the meeting of 11 March 1953 sofar as concerned consideration of, and action on, the applications of WHEC and Veterans. Federal had earlier asked the Commission to submit such materials for the record, but that request had been refused.[1]

[1] Federal's request was dated 15 August 1953, a few days after the Commission claimed that it had duly approved a draft of the minutes of the meeting of 11 March 1953. Federal's request had been directed to the Secretary of the Commission, and it read thus:

Dear Mr. Slowie:

"I have received the much delayed approved minutes of March 11, 1953, when in your office on Tuesday evening this week (#102-A-53 Mimo #87862). In comparing these minutes with the original draft #87832 I find that the approved minutes contained many important changes from the original minutes.

Therefore, to properly present my case I must request copies of the original March 11 minutes, Mimo #86976, and the second redraft, Mimo #87832, which I know have not been approved.

I will also require a copy of Administrative Memorandum #10 as requested in my telegram to you of this week.

I realize this delay of some months in obtaining the copy of the ap-

An appeal from a final judgment permits the appellant to reach any issue upon which such final judgment depends; and, petitioner believes that the same principle applies upon petition for writ of certiorari. Therefore, since as appears from the "Questions Presented" in the accompanying

---

proved minutes was no fault of your office but due to the reluctance of the Commission in making them available to you, and I wish to thank you for the prompt and courteous action of your office in furnishing them to me as soon as they were made available to you.

Very truly yours,

GORDON P. BROWN,
President.

By letter of 19 August 1953, from the then Acting Secretary of the Commission, Federal's requests were denied. That letter reads thus:—

Dear Mr. Brown:

This is in reply to your letter of August 15, 1953, requesting that certain information, namely, Administrative Memorandum #10 and certain alleged draft of the Commission's minutes of March 11, 1953, be made available to you.

While the Commission has delegated to me, as Secretary, the authority to pass upon requests for inspection of records under the provisions of Sec. 0.206 of the Commission's rules, upon securing approval of the General Counsel, I am sorry to inform you that I must deny your requests. The Acting General Counsel has informed me that he disapproves of your request to secure a copy of Administrative Memorandum #10 on the ground that this memorandum relates solely to the internal operations of the Commission and as such is not appropriate for release to the public. With respect to the alleged draft of the Minutes of March 11, the Acting General Counsel has disapproved their release on the grounds that any such documents as may exist are merely working papers of the Commission which are not appropriate for public release, and that the only documents which can be made public with respect to the minutes of any Commission meetings are the approved minutes themselves. I may add that I find myself in agreement with the position taken on both these matters by the Acting General Counsel.

You are advised that you have the right, if you wish to do so, to seek review of this denial of your requests from the Commission in accordance with the provisions of Section 5(d) of the Communications Act.

Very truly yours,

WM. P. MASSING,
Acting Secretary.

Petition, there has been long (and even official) disagreement as to what did occur at the meeting of 11 March 1953, evidence of the fact of such disagreement should be added to the record in this Court for the limited, but important, reasons stated in the companion motion hereto. And since, as a foundation to the companion motion it is appropriate to show that the court below was asked to perfect the record but refused to do so, use of the foundation materials from the record in Appeal No. 12,252 is proper.

(2) Motion to Perfect the Record

The materials Federal seeks to have added to the record in this Court are specified in the original motion therefor submitted to the court below on 20 July 1954, and reprinted in the Annex hereto, and Federal prays that the cited motion and its accompanying Memorandum be read as a part of this motion.

In addition to relying here upon the same grounds presented to the court below in the original motion to perfect the record, Federal tenders the following additional considerations in support of the instant request:

First, Federal wants to make it clear that it does not seek to perfect the record in order for this Court to be in position to settle the long standing argument as to what actually occurred at the meeting of 11 March 1953. Notwithstanding the contrary but inarticulate premise of the court below on this point, Federal submits that no reviewing court has power to settle such a record, certainly not when, as in the instant case, the disputed facts run to the very heart of the matter. The further fact that the dispute as to what

happened at the meeting of 11 March 1953 has never been lawfully resolved [2] does not create any procedural problem here, for it follows, once this fact is established, that the requirement of Section 154(j) of the Communications Act (reprinted on page 5 of the Petition) has not been complied with, i.e., the action allegedly taken on 11 March 1953 respecting the application of WHEC and Veterans has not been entered of record and, therefore, is not an official act of the Commission.

As has been said, "facts can speak for themselves with overwhelming precision," but this is posible only when the fact are allowed to stand forth. The court below, however, was not interested in having the facts; it preferred to rely upon the assurance of the Commission's counsel. Thus, instead of requiring the Commission to disclose the facts relevant to the crucial issue as to whether, with respect to the WHEC and Veterans applications, the authority of the Commission had been lawfully invoked on 11 March 1953, the court below chose to accept assurance of the Commission's counsel that the minute of the meeting of 11 March 1953 allegedly approved by the Commission on 5 August 1953 was in fact accurante.

It is to be remembered that specific issue had been raised by Federal's counsel on that precise point, and Federal knows of no principle of decision which permits any court to arbitrarily accept the assurances of one attorney when

[2] This is one of the contentions advanced by Federal in this case, and is indicated by the text of the Fifth Question (pages 4 and 5 of the Petition), and this contention directs itself to the requirement in Section 154(j) of the Communications Act to the effect that all official acts of the Commission must be entered of record, for as a consequence of having never reached agreement as to what occurred at the meeting of 11 March 1953 respecting the applications of WHEC and Veterans, no action thereon could lawfully be entered of record, and thus there was no official action on that date respecting the matters in question.

another disputes the accuracy of the facts his opponent has vouched for.[3]

Closely related to the foregoing is the fact that the court below, acting without regard to, and in derrogation of, the undisputed facts;[4] and contrary to its own view of applicable law,[5] held that at the meeting of 5 August 1953 the minutes of 11 March 1953 were "duly approved."[6]

Federal would concede that this Court can, even without the materials sought by the instant motion, reach the same conclusion that it would reach with those facts before it. But, Federal sees no justification for this Court

[3] The court below faced a similar question in *Norris & Hirshberg, Inc.* v. *S. E. C.* (1947) 82 U.S. App. D.C. 32, 34 *et seq.*, 163 F.2d 689, and refused to assume that the record there disputed was accurate or duly approved.

[4] Six commissioners attended the meeting of 5 August 1953 so that, see footnote 5 *infra*, a vote of four was necessary to carry a disputed point. Only three who voted to approve the minutes of 11 March 1953 were qualified to vote on that issue, and therefore, there was no due approval, on 5 August 1953, of the minutes in question.

[5] The court below well knows that when six commissioners are present, the vote of four is required to carry a disputed point. Thus, in an *en banc* decision, the court below said: "When a quorum is present, the Federal Communications Commission may act, but only on the vote of a majority of those present." *WIBC, Inc.* v. *FCC* (1958) 101 U.S. App. D.C. 126, 128 259 F.2d 941, *cert. den.* 358 U.S. 920.

[6] Moreover, the court below, in Appeal No. 12,252, said (see page A8 of Appendix to the present Petition) that Federal contended that "Commissioner Hennock's absence [should be construed] as a negative vote in view of her dissent." It is true that Commissioner Hennock dissented, and that fact is clearly inconsistent with *the Commission's contention* that at the meeting in question Commissioner Hennock was "not participating" in the consideration of the WHEC and Veterans applications. However, Federal contended (as appears in Federal's brief in Appeal No. 15,005) that Commissioner Hennock was *not* absent from the meeting, that she did participate in such consideration as was given to the applications of WHEC and Veterans, and that she clearly opposed action on those applications. The three to two vote that so impressed the court below was merely the crude and unlawful result of the insistence of three Commissioners in demanding a vote while Commissioner Hennock was temporarily out of the room in which the meeting was being held.

being required to grope in the twilight zone of assumptions when the relevant facts can be so easily obtained.

Conclusion

For the reasons stated, Federal prays that this Court allow use of the record in the court below in Appeal No. 12,252, and that the court below be directed to require the Commission to supply the materials now missing from the record as specified in the foregoing motion to perfect the record, i.e., as specified in Federal's original motion of 20 July 1954.

Respectfully submitted,

CHARLES F. O'NEALL,
1625 K St., N.W.,
Washington 6, D.C.
Attorney for Petitioner.

Certificate of Service

I certify that copies of the foregoing *Motions* were mailed, first-class postage prepaid, to the following: (a) The Solicitor General, Department of Justice, Washington 25, D.C.; (b) Mrs. Ruth V. Regl, Office of the General Counsel, Federal Communications Commission, 12th St. N.W. at Pennsylvania Avenue, Washington 25, D.C.; (c) Thomas H. Wall, Esquire, Counsel for WHEC, Inc., Munsey Building, Washington, D.C.; and (d) Frank U. Fletcher, Esquire, Counsel for Veterans Broadcasting Co., Inc., Munsey Building, Washington, D.C.; this 17th day of February 1960.

CHARLES F. O'NEALL

APPENDIX

Filed July 20, 1954. Joseph W. Stewart, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 12,252

FEDERAL BROADCASTING SYSTEM, INC., Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION, Appellee

MOTION TO PERFECT RECORD

Comes now counsel for appellant, following the initial pre-trial conference in the above entitled matter and conferences of counsel for all parties, and respectfully moves the Court to direct the Federal Communications Commission to perfect and complete the record before that agency in the following manner:

(*1*) To include in the record the minutes of the meeting of the Commission from August 5, 1953 at which, for the first time, the Commission approved a draft of minutes of its meeting of March 11, 1953, at which events pertinent to the appeal transpired.

(*2*) That the Court direct the inclusion in the record of the Commission by reference the report and order of the Commission, in the matter of Docket No. 9808, adopted May 14, 1952, Pike & Fischer Radio Regulation, Volume 1, Part Three, Page 91:1131, *et seq.*, and memorandum opinion and order of the Commission, in Docket No. 9808, adopted October 29, 1952, Pike & Fischer Radio Regulation, Volume 1, Part Three, Page 91:1136, *et seq.*

(*3*) That the Court direct the Federal Communications Commission to supplement Item 44 as shown in the index of the record by attaching thereto all memoranda or notes in the possession of the Secretary of the Commission, the Minute Clerk of the Commission and the members of the

Commission who participated in the said meeting, relating to the procedure and actual voting and participation of the individual Commissioners in the said meeting, and any draft copies of minutes circulated by the Secretary as correct during the period intervening between March 11, 1953 and the date of the alleged approval of the said minutes on August 5, 1953.

Respectfully submitted,

FEDERAL BROADCASTING SYSTEM, INC.
By WILLIAM A. ROBERTS,
Its Attorney.

POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO PERFECT RECORD

Motion, Paragraph (1): An important element of this appeal is the validity of the action of the Commission with respect to television broadcasting applications for construction permit for the use of Channel 10 in Rochester, New York. While it is conceded that the official record of minutes maintained by a public body normally is the best evidence of the action taken, such minutes are not conclusive when challenged as to the correctness of the report or of the lawfulness or validity of the minutes themselves.

The record as presented to the Court by the Commission in this statutory appeal, fails to disclose that during the protracted period between March 11, 1953, the date of the meetings of the Commission at which appellant alleges unlawful action was taken, and August 5, 1953, other and different drafts of minutes purporting to correctly reflect the action of the Commission were circulated and considered by the Commission and were not approved; that the dissenting opinions of Commissioners Hennock and Merrill disclose irregularity in the Commission's reporting and that the physical copy of the minutes attested as correct and filed with the Court as Item 44 in Volume 3 of the record discloses alterations in the stencil from which the certified minutes were reproduced, particularly at pages 16, 17 and 18 of Minute No. 102-A-53, March 11, 1953. It

is the position of the appellant that in the specific facts of the present appeal, it is incumbent upon the Commission to disclose fully any irregularities or eccentricities in its formal action. Approval by the Court of Paragraph (1) of this motion would permit the Court to be officially aware that the Commission which on August 5, 1953 purportedly approved Item 1-D of Minute No. 102-A-53 of March 11, 1953, consisted of six members, there being one vacancy, the resignation of former Chairman Walker, who had objected and voted to pass over the applications at the first meeting, in the intervening period; and that at the meeting of August 5 Commissioner Doerfer participated and voted to approve minutes while serving in an interim appointment. Commissioner Doerfer had not participated and had no personal knowledge of the events which are the subject of this appeal and which related to the meeting of March 11, 1953 and succeeding meetings. It will also be disclosed that Commissioner Webster likewise voted to approve the minutes of March 11, 1953 although he was not present at the said meeting and had no personal knowledge of the events which transpired at the said meeting. Since Commissioner Hennock dissented from the approval of the minutes and voted accordingly, it would appear that only three members of the Commission out of a quorum present of six, namely, Commissioners Hyde, Sterling and Bartley, were qualified to vote on the said minutes which were in dispute and they do not constitute a majority of either the Commission or a quorum.

Motion, Paragraph (2): It is clear that an administrative agency engaged in the grant of licenses requiring qualifications of fitness and compliance with statutory restrictions must take judicial notice of its own opinions and orders affecting the parties subject to consideration. In this particular case, where the Commission, under most extraordinary circumstances and in violation of its own processing rules, without formal or written presentation of its staff investigation and without opportunity for consideration of the record by the Commissioners, undertook to make a determination furthering monopoly of communications in the City of Rochester, it should have considered its

orders as recently as those of May 14, 1952 and October 29, 1952 affecting the standard broadcast operations in the said city and the pending complaints and demand for investigation made by the appellant. Without this background, the Court would not be fully cognizant of the extent of the Commission's disregard of conventional deliberation. The weight attributed by courts to the actions of administrative agencies is very great and is usually attributed to the special skills and familiarity of the members of the administrative agency in the light of their full knowledge of conditions affecting applicants before them. Evidence indicating disregard of such special knowledge, or failure to utilize opportunities for hearing and investigation, are material in connection with the requested relief sought herein.

Motion, Paragraph (3): To the extent that the minutes constituting part of the present record as filed by the Commission disclose in their majority and minority opinions the extraordinary departure from usual procedure, they are available to the Court. However, it is clear that these minutes are the product of approval by the three Commissioners who voted affirmatively for the disputed action on March 11th, and appellant insists that more detailed notes of the action taken will disclose that at least one Commissioner was denied the opportunity to vote on the Rochester applications because of general objection to the procedure and non-participation in the vote on the motion to approve all items improperly included within a general heading of Item 12 on the agenda. The failure of the Commission to include in the record the detailed minutes indicating the voting or attempted voting on each separate completely independent application, under a collective head, would be material as indicating arbitrary and capricious action on the part of the Commissioners voting to approve the applications.

Filed July 29, 1954. Joseph W. Stewart, Clerk.

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Before: Stephens, Chief Judge, and Prettyman, and Danaher, Circuit Judges, in Chambers.

ORDER

Upon consideration of appellant's motion to perfect and complete the record in the above entitled case (1) by directing appellee to include in said record the minutes of the meeting of the Federal Communications Commission from August 5, 1953, at which time the Commission approved a draft of its minutes of March 11, 1953, at which events pertinent to this appeal transpired, (2) that the Court direct the inclusion in the record of the Commission by reference the report and order of the Commission in the matter of Docket No. 9808, adopted May 14, 1952, and memorandum opinion and order of the Commission in Docket No. 9808, adopted October 29, 1952, and (3) that the Court direct the Federal Communications Commission to supplement Item 44 as shown in the index of the record by attaching thereto all memoranda or notes in the possession of the Secretary of the Commission, the Minute Clerk of the Commission and the members of the Commission who participated in the said meeting, relating to the procedure and actual voting and participation of the individual Commissioners in the said meeting, and any draft copies of minutes circulated by the Secretary as correct during the period intervening between March 11, 1953, and the date of the alleged approval of the said minutes on August 5, 1953, and of the oppositions thereto filed by appellee and by intervenors, it is

ORDERED by the Court that insofar as the aforesaid motion requests inclusion in the record of item (1) above, that said motion be granted and that the Federal Communications Commission be, and it is hereby, directed to prepare and

transmit promptly to this Court a supplemental record containing the minutes of the Federal Communications Commission of August 5, 1953, at which time the Federal Communications Commission approved a draft of its meeting of March 11, 1953.

It is FURTHER ORDERED by the Court that insofar as said motion requests the inclusion in the record of the item (2), the report and order of the Federal Communications Commission in the matter of Docket No. 9808, and the memorandum opinion and order of the Federal Communications Commission in Docket No. 9808, adopted October 29, 1952, and item (3), that the Federal Communications Commission supplement Item 44 as shown in the index of the record, said motion be, and it is hereby, denied.

Per Curiam.

Dated: July 29, 1954

Chief Judge Stephens did not participate in the foregoing order.

(9175-1)